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In The

Supreme Court of the United States

October Term, 1995

RAY A. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONER

STEVEN M. STATSINGER
THE LEGAL AID SOCIETY
Federal Defender Division
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Counsel for Petitioner

Of Counsel:

HENRIETTE D. HOFFMAN
DAVID A. LEWIS

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. THE SIXTH AMENDMENT JURY TRIAL GUARANTEE ATTACHES TO THE ENTIRE PROSECUTION, AND IS NOT "OFFENSE SPECIFIC."

The government's principal argument in this case is that the form of a prosecution, rather than its substance, determines whether the defendant is entitled to a jury trial. The government accepts that prosecutions at which the authorized punishment exceeds six months' imprisonment on any single count must be tried by a jury, but claims that this rule does not apply when the same sentence is authorized as the result of the aggregation of offenses punishable by six months or less. This position derives from a claim that the jury trial right is "offense specific." That assertion, however, is contradicted by the text of the Sixth Amendment, which attaches the jury trial right to the "prosecution," and not to "offenses." Moreover, although the government proffers a putative common-law justification for its position, in fact there is no evidence that at common law a court of summary jurisdiction could impose a sentence greater than six months' imprisonment, in excess of its jurisdictional limit, when multiple petty offenses were tried together. In the end, the government's position in this case characterizes the choice between a jury trial and a non-jury trial as nothing more than the choice between two procedural alternatives. The government fails to acknowledge that the jury trial is a fundamental structural component of the American political and legal systems and is the preferred mode of trying criminal cases. *Singer v. United States*, 380 U.S. 24 (1965). The Court has crafted a limited exception to the requirement of jury trials that applies in those cases in which the defendant is tried either on a

single petty offense or on multiple offenses whose aggregate maximum punishment is six months' imprisonment or less. *Callan v. Wilson*, 127 U.S. 540 (1888). The common-law practices cited by the government provide no basis for the dramatic expansion of this limitation that the government proposes.

1. The government asserts that the common-law history of the jury trial right indicates that no jury trial is required when multiple petty offenses are joined in a single trial, regardless of the number of offenses so joined, and regardless of the ultimate sentencing consequences to the defendant. However, the government has failed to produce any historical support for this position, because it presents no evidence that a common-law summary court could exceed its jurisdictional limits when multiple offenses were joined.

The two early English cases cited by the government (Government's Brief "G.B." at 15) suggest only that two petty offenses could be tried jointly before a justice of the peace.[1] They are not dispositive of the instant case. It is

[1] Both of those cases, *The King v. Swallow*, 101 Eng. Rep. 1392 (K.B. 1799) and *The Queen v. Matthews*, 88 Eng. Rep. 609 (Ch. 1710) appear to sanction the trial of multiple petty offenses in a single proceeding. However, a contemporaneous case, *The King v. Salomons*, 1 T.R. 249-252 (K.B. 1786), suggests that that practice was not universally accepted. There, the defendant was "charged with two distinct offenses, each of which would subject him to a separate penalty." The court noted that "it is to be doubted" that both offenses "could have been included in one conviction." It is also significant that the government cites late 19th century editions of treatises on practices of the justices of the peace to support its position. G.B. at 15. The editions of those treatises in use at the time the Constitution and Bill of Rights were ratified do not contain the language relied upon by the government. *See, e.g.*, 1 Richard Burn, *Justice of the Peace*, 390-97 (18th Ed. 1793).

not Mr. Lewis's position that *all* multiple petty offense prosecutions must be tried by a jury, only those at which the authorized penalty exceeds six months, the jurisdictional limit for non-jury trials established by this Court in *Baldwin v. New York*, 399 U.S. 68 (1970). Common-law practice generally limited summary jurisdiction to "the imposition of fines of up to a hundred pounds and sentences with hard labor up to six months." Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L.R. 917, 934 (1926) (footnote omitted); *see also Baldwin*, 399 U.S. at 71 ("with a few exceptions, crimes triable without a jury in the American States since the late 18th century were also generally punishable by no more than a six-month prison term") (footnote omitted). The government cites no historical evidence that a magistrate or a justice of the peace could, by trying several offenses together, impose a penalty greater than that ordinary jurisdictional limit.

When interpreting the Constitution's jury trial guarantees, the Court has limited its reliance on the common law to the acceptance of those common-law rules that were so clearly understood and so universally incorporated into colonial practice that they could necessarily be deemed incorporated into the language of the Constitution. *Schick v. United States*, 195 U.S. 65 (1904). This cannot be said about the treatment of multiple petty offenses, since English antecedents did not produce a uniform

colonial practice. "Different environments evolved different applications of trial by jury and its limits." Frankfurter & Corcoran, *supra*, at 936. Accordingly, the government has failed to establish with sufficient clarity the parameters of either English common-law practice or colonial practice with respect to the treatment of multiple petty offenses.

The common law provides no greater support for the government's argument that the jury trial right is exclusively "offense specific."[2] The Constitution must be interpreted in light of the common law, but the Court has never read it as incorporating every peculiarity of common-law practice. In fact, the Court has frequently deviated from common-law practice when interpreting the Sixth Amendment. Thus, in *Williams v. Florida*, the Court rejected the notion that "every feature of the jury as it existed at common law . . . was necessarily included

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[2] Even accepting the government's insistence that the common-law character of the offense charged determines jury triability, Mr. Lewis was still entitled to a jury trial. He was charged with an offense that was serious, and would have been tried by a jury, at common law. Brief for Petitioner at 24-26. Nor is the government correct in asserting that this question is "not properly before this Court." G.B. at 20, n.9. That the common-law character of Mr. Lewis's conduct entitles him to a jury trial is simply an argument in support of his claim that he was entitled to jury trial under the Sixth Amendment. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 112 S.Ct. 1522, 1532 (1992). *See also, Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961, 964-65 (1995) ("alternative argument" first presented in brief on the merits was "fairly embraced" within the question presented).

in the Constitution when that document referred to a 'jury.' " 399 U.S. 78, 91 (1970) (footnote omitted). *See also Colgrove v. Battin*, 413 U.S. 149, 156 (1973) (constitutional history reveals "no intention on the part of the Framers to equate the constitution and common-law characteristics of the jury") (citation to *Williams* omitted). Similarly, *Duncan v. Louisiana* explicitly rejected as arbitrary the subjective process by which jury triability or the designation as "petty" was determined at common law. 391 U.S. 145, 160-61 (1968). Since *Duncan*, the Court has defined the category of cases to which the jury trial right attaches almost exclusively by the authorized penalty, in full recognition that this deviates from common-law practice. *Blanton v. City of North Las Vegas*, 489 U.S. 438, 542 (1989); *Baldwin*, 399 U.S. at 72-74.

2. The government's "offense specific" argument leads to outcomes that are clearly out of step with the proper interpretation of the Sixth Amendment. First, according to the government, multiple petty offenses can be disposed of at a non-jury trial even if the authorized penalty is several years' imprisonment. *But see Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (jury trial required on jointly tried petty contempts with aggregate penalty of 39 months' imprisonment); *see, generally, United States v. Goodwin*, 457 U.S. 368, 387 & n.1 (1982) (Brennan, J., dissenting) (multiple petty offenses with aggregate authorized penalty of 28 months' imprisonment). Moreover, the government's focus on the nature of the offense rather than the aggregate authorized penalty would mean that a defendant who was jointly tried on a felony and a petty offense would have the right to have the jury determine guilt or innocence only on the felony, but that the

judge would remain the finder of fact on the petty offense.

The Sixth Amendment guarantees a jury trial in "all criminal prosecutions." The government's lengthy string of citations to cases in which the Court used the term "offense" in discussing the scope of the Sixth Amendment guarantee (G.B. at 10-14) establishes nothing more than that the case at bar is one of first impression. The cases on which the government relies do not establish that the Sixth Amendment jury trial guarantee is "offense specific." They merely establish that the term "criminal" in the Sixth Amendment refers to "serious," rather than "petty," criminal matters. *Callan*, 127 U.S. at 549. Since "criminal" modifies "prosecution," the question posed by this case is not whether the charged offense was serious, but rather whether the "prosecution" itself was serious.

The Court, construing the Sixth Amendment in light of a universally accepted common-law practice, has arrived at the conclusion that a trial on a single offense punishable by less than six months' imprisonment is not a "serious" prosecution. *Baldwin*, 399 U.S. at 72-74. However, based on this definition of criminal seriousness, any prosecution at which the authorized penalty exceeds six months' imprisonment – whether through aggregation or not – must be tried by a jury. *See Frank v. United States*, 395 U.S. 147, 149 (1969) ("In . . . criminal prosecutions, the severity of the penalty authorized . . . is the relevant criterion" determining jury triability). The prosecution in this case was accordingly "serious" within the meaning of the Sixth Amendment.

The authorized penalty represents the most accurate measure of society's judgment of the defendant's conduct. *Blanton*, 489 U.S. at 541-42; *Baldwin*, 399 U.S. at 68. Thus, the applicability of statutes such as 18 U.S.C. § 3584(a) is relevant to considering whether the jury trial right attaches to a particular prosecution. The government recognizes that 18 U.S.C. § 3584(a) is a substantive sentencing statute authorizing consecutive sentences in multiple petty offense prosecutions. G.B. at 23. The government also recognizes that this statute represents a congressional judgment that committing multiple offenses is more serious than committing one. G.B. at 22-23.[3] From these propositions flows the conclusion that the aggregate authorized penalty is a more accurate gauge of the seriousness of a single prosecution than is the penalty authorized for just one offense in that prosecution, no matter how many are charged.

This is so even if Congress "cannot asses the seriousness of all potential combinations of offenses" (G.B. at 23) to which § 3584(a) applies, because such an assessment is not a necessary prerequisite to attaching the jury trial right to a multiple petty offense prosecution. Congress cannot assess the ultimate seriousness of all of the potential combinations of aggravating and mitigating circumstances in a case involving a single serious offense, yet the authorized sentence is still the most accurate measure of criminal seriousness in that situation.

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[3] Significantly, in so conceding, the government has admitted that the principal basis for the decision below was incorrect.

The Court's recognition of the significance of an authorized penalty in excess of six months' imprisonment animated its decision in *Codispoti v. Pennsylvania*. There, the defendant was tried on seven acts of criminal contempt at a single bench trial; after convicting the defendant the judge aggregated the "petty" (that is, six-month or less) sentences for each count and imposed a 39-month term of imprisonment. The Court held that the contemnor should have received a jury trial because this aggregation of petty penalties rendered the prosecution "serious." 418 U.S. at 517.[4]

For the purposes of the jury trial right, the only difference between criminal contempt and other crimes is the manner in which the maximum authorized penalty is set. In contempt cases, where there is no statutory maximum set by a legislature, the judge determines criminal seriousness by imposing sentence. *Codispoti* stands for the proposition that this inherently "legislative" decision requires a jury trial in contempt cases when the judge determines that an aggregate "serious" penalty is authorized. 418 U.S. at 517.[5] That reasoning has equal force in

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[4] The government incorrectly argues that *Codispoti* did not involve an aggregation of penalties at all because the contemnor was in reality tried on "one contempt," which the government defines as his "trial conduct as a whole." G.B. at 29, citation omitted. The Court explicitly rejected this characterization of the record in *Codispoti*. The Court's decision makes clear that it viewed the contemnor as facing "individual charges" that were tried in a single proceeding, and for which "separate sentence[s]" were imposed. 418 U.S. at 516.

[5] The government is incorrect in asserting that the rule of *Codispoti* derives from "concerns unique to charges of criminal contempt" – specifically that a jury trial is required because of

those non-contempt cases in which the legislature itself has made this same determination.[6]

Codispoti also addresses the issue of the difference between joint and serial trials of multiple petty offenses. There, since the defendant was tried on seven petty contempts in a single proceeding, the aggregation of the petty penalties rendered that prosecution "serious" under the Sixth Amendment. *Id*. But a plurality of the Court also recognized that if the contempts had been adjudicated serially a total sentence in excess of six months could constitutionally have been imposed without a jury trial because "each contempt [would have] been dealt with as

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the "potential for abuse" inherent in having the judge serve as both "victim" and the judge. G.B. at 28-29. This argument fails to recognize that in *Codispoti* a different judge presided over the contempt trial. 418 U.S. at 507. In any event, that concern is fully addressed by the rule of *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) and Fed. R. Crim. P. 42(b), which disqualifies the judge if the contempt charged involves "disrespect to or criticism of" that judge.

[6] Limiting *Codispoti* to its facts, as the government argues, would mean interpreting the Sixth Amendment as affording a more expansive jury trial right to acts of criminal contempt than to that same conduct when charged as a violation of a criminal statute. *Cf. United States v. Dixon*, 113 S.Ct. 2849, 2853-54 (1993) (defendants convicted of contempt for conduct that violated both a court order and a specific criminal statute). Under the government's position in this case, there is no right to a jury trial on several petty offenses tried together, no matter how great the aggregate penalty. But if those same actions violated a court order and were tried as criminal contempts, the Sixth Amendment, as applied in *Codispoti*, would require a jury trial. This is a particularly anomalous outcome, since historically contempts were not tried by a jury at all. *Bloom v. Illinois*, 391 U.S. 194, 195-96 (1968).

a discrete and separate matter." 418 U.S. at 515. As long as the authorized penalty for each of those individual prosecutions was petty, none of them would be considered "serious." Thus, even though the ultimate consequence to the defendant would be a lengthy sentence, such serial prosecutions would not implicate the Sixth Amendment's jury trial guarantee.

3. Attaching the jury trial right to prosecutions where the authorized penalty exceeds six months' imprisonment, whether by aggregation or not, is fully consistent with the purposes of the jury trial itself. The government treats the choice between a jury trial and a non-jury trial as arbitrary and unimportant, in effect reducing the jury trial to an abstract procedural right that is of little concern either to the defendant or society. In fact, the right to a jury trial is of enormous constitutional significance. The Court has long recognized that it is not only the preferred mode of adjudicating criminal cases, but is the "tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. at 36.

As expressed in the Constitution, the right to a jury trial in serious criminal cases represented a fundamental cornerstone of the Framers' conception of liberty. The Court has repeatedly emphasized the importance of interposing the lay jury as the finder of fact in those cases in which the government seeks the imposition of a lengthy period of imprisonment. *Singer*, 380 U.S. at 31 (jury trial right "clearly intended to protect the accused from oppression by the government"); *Duncan*, 391 U.S. at 156. The jury trial provides a critical buffer between the individual and the state's power to deprive him of liberty. It

thus serves to protect all citizens from the "corrupt or overzealous" prosecutor or the "compliant, biased or eccentric" judge. *Id.*

The requirement of jury trials in serious cases accordingly benefits all of society, not just the defendant on trial. It is more than a rule of criminal procedure. It is a political right – "an allocation of political power to the citizenry." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U.Chi. L. Rev. 867, 876 (1994). Civic participation in the criminal justice system has always been recognized as the most satisfactory means of curtailing the possibility of "unchecked power." *Duncan*, 391 U.S. at 156. As such, it assures that the public will continue to accept the legitimacy of the criminal justice system in general and its ability to mete out serious punishments in particular.

This democratic function holds true whether the serious penalty derives from a single count or from several counts. With respect to the core concerns of the jury trial right, these two situations are indistinguishable. They present equivalent opportunities for prosecutorial or judicial abuse, and are equally liable to result in a serious punishment.

II. THE GOVERNMENT HAS FAILED TO ADDRESS MR. LEWIS'S ARGUMENT THAT ONLY THE LEGISLATURE CAN EXTINGUISH THE RIGHT TO A JURY TRIAL.

In his main brief, Mr. Lewis demonstrates that there exists no common-law or constitutional precedent for allowing the jury trial right to be unilaterally extinguished by the sentencing judge. Brief for Petitioner at 27-31. The government has simply ignored this argument, and in fact has presented no historical evidence to support its view that a pretrial sentencing stipulation can deprive a defendant of a jury trial. Instead, the government merely invokes arguments that have repeatedly, and with sound justification, been rejected by the Court.

The government argues that either a pretrial sentencing promise or the actual sentence imposed determines jury triability. G.B. at 31. But in statutory offense cases the Court has consistently held that the subjective sentencing consequences faced by the particular defendant are in no way relevant to the jury trial right. The authorized penalty set by the legislature, and not the judge's own view of the defendant's conduct, determines jury triability. That is why the sentence actually imposed is irrelevant to whether the defendant was entitled to a jury trial. *Blanton v. City of North Las Vegas*, 489 U.S. at 541-42; *Duncan v. Louisiana*, 391 U.S. at 160-61; *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937). The government fails to explain how the right to a jury trial could be extinguished by a pretrial sentencing stipulation, when it is never extinguished by the sentence actually imposed.

A criminal prosecution at which the authorized penalty exceeds six months' imprisonment is serious whether that penalty results from aggregation or not. Other than to restate its view that the aggregate penalty should not trigger a jury trial at all (G.B. at 31, n.18), the government has failed to assert a rational distinction between prosecutions that are "serious" as the result of the aggregation of authorized penalties and those that are "serious" because the penalty authorized for a single count exceeds six months' imprisonment. Thus, the government's position would permit a judge to utilize a pretrial stipulation to deprive a defendant of a jury trial in *any* case, even where serious felonies were charged.

It is of no relevance here that in contempt cases either a pretrial sentencing promise or the sentence actually imposed determines jury triability. *Frank v. United States*, 395 U.S. at 149-50. There is no legislatively determined statutory maximum in criminal contempt cases. Thus, although the Court disfavors making jury triability contingent on the judge's subjective view of criminal seriousness, in criminal contempt cases there is no other measure of seriousness available. In any event, deferring to the court's own view of criminal seriousness is appropriate in such cases, since the offense is against the court itself.[7] But where the offense is against society, it is society's judgment alone that determines the jury trial right. "In

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[7] Moreover, absent such a rule all contempts would have to be tried by a jury. Since there is no maximum sentence set by the legislature, any contempt is potentially punishable by more than six months' imprisonment unless the judge decides otherwise.

[non-contempt] criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion." *Id.* at 149.

Finally, it is significant that the government does not argue that the procedure authorized in *Scott v. Illinois* is applicable to the jury trial right. In *Scott*, the Court held that the Sixth Amendment does not require the appointment of counsel in state court misdemeanor cases if the court promises in advance of trial not to impose a sentence of imprisonment. 440 U.S. 367, 374 (1979). There are persuasive reasons for the Court to confine the holding of *Scott* to that particular situation.

The nature of the rights implicated in *Scott* and in this case are dramatically different. At stake in *Scott* was the issue of who would represent the defendant at trial – appointed counsel, retained counsel, or no counsel. While this is an extremely important decision, it is primarily of concern only to the defendant himself. In contrast, the potential deprivation of a jury trial implicates the considerably broader question of who will judge guilt or innocence. This is a decision in which all of society, and not just the defendant on trial, has an interest. This difference is illustrated by the fact that a defendant cannot be compelled to be represented by counsel against his will (*Faretta v. California*, 422 U.S. 806, 836 (1975)), but can be compelled to be tried by a jury against his will. *Singer v. United States*, 380 U.S. at 36. "[T]he maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of the government . . . and . . . the court must be had." *Id.* at

34 (quoting *Patton v. United States*, 281 U.S. 276, 312-13 (1930)).

There is another important difference between *Scott* and the instant situation. Here, the magistrate judge wielded the pre-trial stipulation as a means of extinguishing the jury trial right in its entirety. This went far beyond the bounds of *Scott*. *Scott* did not sanction the extinction of the core of the Sixth Amendment right – which guarantees the "Assistance of Counsel" – in its entirety. Rather, by refusing to extend the rule of *Gideon* to state court misdemeanor cases, it affected only the right to appointed counsel. 440 U.S. at 370. Even under *Scott*, a defendant in a state court misdemeanor case has an indelible right to be represented by counsel, and no unilateral action by the trial court can extinguish that right.[8]

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[8] The government has failed to identify a single Sixth Amendment right that is unilaterally extinguishable by the trial court. The court certainly cannot promise to impose a lenient sentence and then try the defendant in secret, or deny him notice, the opportunity to be heard, or to confront the evidence against him, even when the defendant is charged with a single petty offense. *See, e.g., In re Oliver*, 333 U.S. 257, 273 (1948) (Sixth Amendment rights to notice, opportunity to be heard, public trial, confrontation and counsel attach to prosecution for a single petty offense).

CONCLUSION

For the reasons stated herein, as well as those in his main brief, petitioner prays that the judgment below be reversed.

Respectfully submitted,

STEVEN M. STATSINGER
THE LEGAL AID SOCIETY
Federal Defender Division
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

Counsel for Petitioner

Of Counsel:

HENRIETTE D. HOFFMAN
DAVID A. LEWIS